IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In the Parentage of:	)	NO. 56639-3-I
	)	
ALR,	)	
	)	
Minor Child,	)	
	)	
JOHN W. RUSH,	)	UNPUBLISHED OPINION
	)	
Respondent,	)	
	)	
and	)	
	)	
MARY W. KESTER (n/k/a KILWIEN),	)	
	)	
Appellant.	)	FILED: AUGUST 21, 2006

BECKER, J. – After granting the mother's petition to relocate to Chicago with her daughter, the trial court modified the parenting plan to allow ample residential time to the father in Seattle during the child's winter and summer vacations. The mother objects that the allocation of vacation and holiday time is too one-sided in favor of the father. But the new plan serves the child's best interests by fostering her continued relationship with her father in the face of the geographical distance that now separates them. We find no abuse of discretion.

Mary Kilwien and John Rush are the parents of a daughter who is now four years old. Mary is also the primary residential parent of her two older sons from a former marriage. At the time their daughter was born in February 2002, Mary and John were living together and were not married. When their relationship deteriorated, they began to struggle and litigate over parenting issues.

A temporary parenting plan was entered in October 2003. A parenting evaluator issued a report in March 2004. The evaluator concluded that both Mary and John were good parents, each of them capable of caring for the child. The report recommended that Mary be designated as primary residential parent, and that John be allowed ample residential time to include 10 overnights out of every 28 and alternating holiday periods once the child turned four. This schedule was to remain in effect during the summer, with each parent to have a two week vacation with the child.

Mary married Ed Kilwien in August 2004. Soon, Ed was offered a job in Chicago. In December, 2004, Mary filed a notice of intent to relocate to Chicago with the child. John objected to the relocation and asserted that the request was made in bad faith. He asked to be designated the primary residential parent.

After a six day trial, the trial court determined that the child should be allowed to relocate with Mary to Chicago. The court entered an order listing the factors on which it based its decision under the Child Relocation Act:

i. The mother's new husband has a legitimate job opportunity in Illinois that will pay better and offer better opportunities for advance.

ii. While the child is well-bonded to both parents and both the mother and the father are good parents, it would be more detrimental to the child to disrupt the child's contact with the mother than to disrupt the child's contact with the father.

iii. The child has older siblings in the mother's household who have been permitted to relocate. The child would benefit from maintaining contact with these siblings.

iv. The child has significant connections with the father's family in Washington.

v. The mother acted in good faith in requesting the relocation, though the court has concerns that the mother has fought hard in the past to have a very restrictive parenting plan without much basis. The father acted in good faith in objecting to the relocation.

vi. The other statutory factors were given little weight under the circumstances of this case.

The court entered a new parenting plan which made significant adjustments to the plan that had been previously approved. Before the child begins school, she will reside with John in Seattle for one week each month, and for a two-week period during one summer month. Once she begins school, John's only scheduled residential time in Seattle will be during her winter and spring school breaks, and during the summer. The child's residential time with John in the summer will increase until she is nine. From that time on she will reside with John for all but two weeks of the summer holiday. In addition, he will have an option to exercise residential time with the child in Chicago, with the schedule of those visits subject to Mary's discretion, and disputes to be resolved by arbitration.

RELOCATION

Mary assigns error to the court's comment in finding of fact 5 about her past efforts to restrict the father's residential time with the child:

> The mother acted in good faith in requesting the relocation, though the court has concerns that the mother has fought hard in the past to have a very restrictive parenting plan without much basis. The father acted in good faith in objecting to the relocation.

(Emphasis added.) Mary describes this finding as "troubling" and "unsubstantiated". She contends the trial court was unduly swayed by "friendly parent" evidence offered by John. Under the "friendly parent" concept, primary residential placement is awarded to the parent most likely to foster the child's relationship with the other parent. In re Marriage of Lawrence, 105 Wn. App. 683, 687, 20 P.3d 972 (2001). Because the "friendly parent" concept is not the law of this state, a trial court's use of it in making a custody determination would be an abuse of discretion. Lawrence, 105 Wn. App. at 688.

The Child Relocation Act creates a rebuttable presumption that relocation will be permitted. RCW 26.09.520. To rebut this presumption, an objecting party must demonstrate "that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person," based upon 11 factors listed in the statute. RCW 26.09.520. The language objected to by Mary reflected the court's consideration of the fifth statutory factor: "The reasons of

each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation". RCW 26.09.520(5). John argued that Mary's relocation request was made in bad faith, and that she had concocted the move to Chicago in order to minimize his time with their daughter. Although the court recognized this as a possible inference from the evidence, in the end the court decided that Mary had acted in good faith, and allowed the relocation of the child. The court's finding describes the basis for the court's decision in terms of the statutory factor. It lacks any suggestion that the court allowed the "friendly parent" concept to influence the terms of the modified parenting plan. We will not disturb the finding and will not consider it as a basis for reversing the plan.

MODIFICATION

Mary proposed to modify the parenting plan so as to reduce John's residential time to three overnights every 28 days during the time before the child began kindergarten. After she began kindergarten, there would be no regular residential time for John; instead, he would have an option to visit the child in Chicago for up to three overnights per month. The court rejected Mary's proposal, and instead adopted a plan allowing John most of the winter and summer vacations, as well as additional optional time in Chicago upon seven days notice to Mary.

Mary contends the child's best interests are not served by a plan that

allows her so little vacation and holiday time with Mary and her two older boys. Mary is also concerned that the additional option of negotiated residential time in Chicago has the potential to alter the child's primary residence and to affect adversely her normal academic, recreational, and daily living routines.

Modification of a parenting plan is subject to the discretion of the court. It must not be based on untenable reasons or grounds or be manifestly unreasonable. In re Yeamans, 117 Wn. App. 593, 597, 72 P.3d 775 (2003).

It is the policy of the Parenting Act for trial courts to fashion parenting plans in the best interests of the child. The relationship between "the child and each parent should be fostered unless inconsistent with the child's best interests." RCW 26.09.002. The best interests of a child are ordinarily served when the "existing pattern of interaction between a parent and child is altered only to the extent necessitated". RCW 26.09.002. The residential provisions of a parenting plan should encourage each parent "to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances." RCW 26.09.187(3)(a).

By granting permission to Mary to relocate, the court necessarily interfered with the existing pattern of interaction between John and his daughter. The task then, as the court recognized, was to fashion a new parenting plan that would foster and continue their relationship despite the distance and the

complications of travel. The court sought to mitigate John's loss of weekly time with the child by adding time during the winter and summer school breaks, and by providing for the optional time in Chicago. Under the modified plan, the child still resides with Mary and her family the majority of the time.

In essence, Mary is arguing that the trial court failed to solve the problem in the way that Mary would have preferred. That is not sufficient to show an abuse of discretion. We affirm the modified parenting plan.

TRAVEL EXPENSES

Long distance travel expenses are considered extraordinary expenses not accounted for in the basic child support obligation. RCW 26.19.080(3). The child support statute mandates that these expenses "shall be shared by the parents in the same proportion as the basic child support obligation." RCW 26.19.080(3).

The child support order in this case, entered in September 2004, allocated to Mary 33 percent of the child support obligation.[1] The relocation order reversed these percentages with respect to the child's airfare expenses, with Mary ordered to pay 67 percent and John 33 percent. The court found it appropriate to make Mary responsible for a greater percentage of the travel

[1] Clerk's Papers at 45, Order Granting Relocation (July 1, 2005). The child support order of 2004 is not in the record. The relocation order variously describes the child support order as establishing a 77/33 and a 77/23 split. We assume these are scrivener's errors.

costs because they were necessitated by her new husband's move to Chicago where he would have a better job and earn considerably more than John:

> The mother's only basis for requesting a relocation is to follow her new husband to a new job that pays better than his current position and offers better opportunities for advancement in the future.
>
> The mother's new husband earns a salary of $300,000/yr. plus $50,000 in stock grants plus benefits at his new job, which is approximately four times as much as the income listed for the father in the 9/16/04 order of child support.

Mary assigns error to the court's decision to allocate travel costs in a different proportion than the basic child support obligation.

Where a trial court deviates from the basic support obligation, supported by findings in the child support order, the court may also allocate special expenses such as long-distance transportation costs in a manner that is not proportional to the basic child support obligation. In re Marriage of Casey, 88 Wn. App. 662, 668, 967 P.2d 982 (1997)(based on a significant disparity in parents' incomes, trial court granted mother a deviation from her basic support obligation, and ordered father to pay all travel expenses for children). But if the trial court does not deviate from the basic child support obligation, then it cannot deviate from that proportion when allocating the extraordinary expenses. In re Yeamans, 117 Wn. App. 593, 601, 72 P.3d 775 (2003).

John contends that Yeamans was wrongly decided. He relies on In re Marriage of Katare, 125 Wn. App. 813, 834, 105 P.3d 44 (2004). According to John, Katare has now established that even where a trial court does not deviate

from the standard calculation in the child support order, the court may nevertheless allocate travel costs in a proportion different from child support, so long as the court makes findings to explain its rationale for doing so.

In Katare, the trial court allowed the mother to relocate to Florida with the children. There was no deviation from the standard calculation in the child support schedule. The basic support obligation in the child support order was allocated 65 percent to the father and 35 percent to the mother. The trial court ordered the father to pay for 100 percent of the long distance travel costs involved in visiting his children in Florida while they are young. When the father requested that the travel costs be allocated on a 65/35 basis, the same as the child support obligation, the trial court justified the discrepancy on the basis that the property decree awarded all of the community's air miles to the father so that he could use them for his residential time with the children if he chose to do so. Katare, 125 Wn. App. at 834-836. In other words, because the father received all the air miles, the requirement to pay all the travel costs was not really a deviation.

In Katare, we did not depart from our prior decisions based on RCW 26.19.080(3). We simply recognized that "in some cases it may be appropriate to consider property distribution payments pursuant to a dissolution order" as a resource to be taken into account when determining whether to deviate from a child support schedule. Katare, 125 Wn. App. at 835 n.34, citing In re Marriage

of Stenshoel, 72 Wn. App. 800, 866 P.2d 635 (1993). We remanded for the trial court "to clarify whether it intended to deviate in the child support order from the requirement that each parent pay a proportionate share of the travel expenses." Katare, 125 Wn. App. at 836.

The present case is unlike Katare in that the trial court apparently intended to make Mary's share of travel costs greater than her share of child support. Thus, Mary might have a valid statutory argument if she had preserved it for appeal. However, she fails to identify any point in the record where she raised an objection. In fact, at the presentation of findings after trial, the only reference by Mary's counsel to airfare costs shows Mary to be resigned to paying more than her normal share: "But actually Mary – Ms. Kilwien's paying two-thirds of the travel anyway".[2] We conclude Mary waived any right she may have had to challenge the allocation of airfare costs when she did not object below. RAP 2.5(a).

REQUEST FOR ATTORNEY FEES

John requests attorney fees on appeal on the basis of the parties' relative need. John claims the mother's household income is four times greater than his. Earning $75,000 per year, John has not shown a need for financial assistance from Mary in order to respond to her appeal. He also requests fees for a

[2] Report of Proceedings, July 1, 2005, at 19.

frivolous appeal. Because Mary's arguments are not totally devoid of merit, we decline to sanction Mary under RAP 18.9. John's request for attorney fees is denied.

Affirmed.

Becker, J.

WE CONCUR:

Ajid, J.

Grosse, J.